U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

OCT 23 2007

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN 06 246 51023

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides information technology services. It seeks to employ the beneficiary permanently in the United States as a senior systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The petitioner claims to be a successor-in-interest to the entity that filed the alien employment certification and requests that the beneficiary in this matter be substituted for the original beneficiary listed on the alien employment certification.[1] The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief. For the reasons discussed below, we uphold the director's basis of denial. In addition, we find that the petitioner has not established that it is a successor-in-interest to the entity that originally filed the alien employment certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 23, 2001. The proffered wage as stated on the Form ETA

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[1] Substitution of the beneficiary is permitted pursuant to *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994)(invalidating the portion of the interim final rule, 56 Fed. Reg. 54925, 54930 (Oct. 23, 1991), which eliminated substitution of labor certification beneficiaries pursuant to 20 C.F.R. § 656.30(c)(2)).

750 is $76,057 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 2006.

On the petition, the petitioner claimed to have an establishment date in 2004, a gross annual income of $1,500,000, an undisclosed net income and 15 employees. In support of the petition, the petitioner submitted: (1) documents purporting to establish that Sysnet Technology Resource, Corp. (STR) is the successor-in-interest to the entity that filed the alien employment certification, Innotrex, and that the petitioner is the successor-in-interest to STR; (2) what appear to be Innotrex's 2001 Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Return for an S Corporation, filed under the corporation's previous name, SysNET Consulting Services, Corp. (SysNET);[2] (3) STR's 2002 and 2003 IRS Forms 1120S; (4) the petitioner's 2004 IRS Form 1120S and (5) a March 15, 2005 letter from [redacted] Senior Account Manager at Aquent, confirming that STR "has" an agreement with Aquent to sell current receivables at 75 percent of their face value to Aquent up to $150,000.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 24, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted the 2005 IRS Form 1120S for the petitioner. In addition, the petitioner submitted the beneficiary's pay statements for 2006 and the petitioner's quarterly returns for the third and fourth quarters of 2005.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 19, 2007, denied the petition.

On appeal, counsel acknowledges that the petitioner's purported predecessor-in-interest shows a net loss in 2002 and 2003, but asserts that the director should have considered the agreement with Aquent.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it or its purported predecessor-in-interest employed and paid the beneficiary any wages in 2001 through 2005.

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[2] According to a July 31, 2000 Certificate of Amendment, SysNET Consulting Services Corporation changed its name to Innotrex.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The tax returns in the record reflect the following information for the following years:

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[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2001†	2002‡	2003‡	2004*	2005*
Net income	$183,592	($45,697)	($204,857)	$16,360	$46,173
Current Assets	$117,446	$15,940	$85,516	*	$162,325
Current Liabilities	$466,019	$30,832	$268,857	*	$116,711
Net current assets	($348,573)	($14,892)	($183,341)	*	$45,614

† From [redacted]s return.
‡ From STR's returns.
* From the petitioner's returns. The petitioner did not complete Schedule L in 2004; thus, we cannot determine the petitioner's current assets or current liabilities or calculate its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 through 2005. In 2001, SysNET shows sufficient net income to cover the proffered wage. In 2002 and 2003, as acknowledged by counsel on appeal, STR shows a net loss and negative net current assets. The petitioner, therefore, has not demonstrated STR's ability to pay the proffered wage out of its net income or net current assets. While counsel presumes that the petitioner's net income in 2004 and 2005 is sufficient, it is less than the proffered wage in both years. We cannot determine the petitioner's net current assets in 2004. In 2005, the petitioner's net current assets were also less than the proffered wage. Thus, the petitioner has not demonstrated its own ability to pay the proffered wage out of its net income or net current assets in 2004 or 2005.

Counsel relies on the letter from Aquent to establish STR's ability to pay the proffered wage in 2002 and 2003. Counsel is not persuasive. Aquent agrees to buy STR's "current receivables" at 75 percent of face value. While this may assure that STR receives at least 75 percent of its current receivables when owed, it does not constitute additional funds available to SRT. As we have already considered the petitioner's net current assets above, which take into account current receivables, the agreement with Aquent could only serve to reduce those receivables by 25 percent. Moreover, the record lacks evidence that the petitioner has a similar agreement with Aquent or another entity. Thus, the agreement between SRT and Aquent cannot establish the petitioner's ability to pay the proffered wage in 2004 or 2005. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

Moreover, Innotrex did not assign any employees to STR until April 2003. Thus, it is not clear why STR's tax return, and not that of Innotrex (whether filed under the name SysNet Consulting Services Corp. or Innotrex), is relevant prior to 2003. Similarly, STR did not assign any employees to the petitioner until January 2005. Thus, it is not clear why the tax return of the petitioner, and not that of STR, is relevant for 2004.

The petitioner failed to submit evidence sufficient to demonstrate that its purported predecessor-in-interests or it had the ability to pay the proffered wage during 2001 through 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also failed to establish that STR is the successor-in-interest to Innotex (formerly SysNET) or that the petitioner is the successor-in-interest to STR. The alien employment certification was filed by Innotrex Corp. on January 23, 2001. The petitioner submitted a July 31, 2000 Certificate of Amendment of Certificate of Incorporation by SysNET resolving that the name of the corporation is Innotrex Corp. The petitioner also submitted an agreement and affidavit dated April 1, 2003 whereby Innotrex assigned STR 18 of its employees. STR accepted "all responsibilities and obligations relating to the employees listed herein, including, but not limited to, matters pertaining to the United States Immigration and Naturalization Service and the United States Department of Labor." Finally, the petitioner submitted a January 1, 2005 agreement whereby STR assigned 11 of its employees to the petitioner. As in the previous agreement, the petitioner accepted "all responsibilities and obligations relating to the employees listed herein, including, but not limited to, matters pertaining to the United States Immigration and Naturalization Service and the United States Department of Labor." None of the assigned employees are the beneficiary in this matter or the original beneficiary listed on the alien employment certification for which the beneficiary in this matter has been substituted.

In response to the director's request for additional evidence, the petitioner submitted an October 17, 2001 letter from [redacted], III, Director of the Business and Trade Services at the legacy Immigration and Naturalization Service (INS), now CIS. [redacted] is responding to a question regarding an attorney's client that "purchased a significant portion of company M's business assets and acquired over 2,000 of its employees." [redacted] asserts that legacy INS had taken the position "that a company is a successor in interest when it has taken on all of the immigration related liabilities *of the company it has acquired, merged, etc.*" (Emphasis added.)

Even if we accepted the letter as authoritative for the proposition that the successor-in-interest must have only assumed the predecessor's immigration related rights, duties, obligations and assets, the letter from [redacted] contemplates a takeover of at least some of the predecessor's business. An assignment of a handful of employees does not constitute a buy-out or merger of any portion of the predecessor's business.

Regardless, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") Accordingly, counsel's reliance on the 2001 letter from [redacted] is misplaced.

If the petitioner is purchased, merges with another company, or is otherwise under new ownership, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481, 482 (Commr. 1986). It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *Id.* The Commissioner in that case specifically stated that the petitioner in that matter had failed "to adequately describe *the transfer of business* from [redacted] Auto Body to Dial Auto Repair." *Id.* at 483 (emphasis added). The record lacks evidence that SysNET transferred any of its business to STR or that STR transferred any of its business to the petitioner. The only rights, duties, obligations and assets of the predecessor assumed by STR and subsequently by the petitioner were the poorly defined "responsibilities and obligations relating to the employees listed herein, including, but not limited to, matters pertaining to the United States Immigration and Naturalization Service and the United States Department of Labor." As stated above, the original beneficiary listed on the alien employment certification in this matter is not even one of the assigned employees. Without evidence that SysNET transferred business to STR or that STR transferred any business to the petitioner, the petitioner cannot establish that it is a successor-in-interest to Innotrex, the entity that filed the application for alien employment certification.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.